SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 820

R. L. HYER AND W. M. DAVIS AND SON COMPANY, A CORPORATION,

Petitioners,

vs.

BENJAMIN H. ROTH, ET AL., CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF B. H. ROTH AND COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

At the time of the preparation of this Petition and Brief, the opinion in this case has not yet been published in the official reports, nor does it appear in the advance sheets of the Federal Reporter. A copy appears at page 239 of the Record.

II.

Jurisdiction.

1. Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347.

2. The date of the judgment to be reviewed is January 15th, 1943.

3. The nature of the case, and the fact that the rulings below were such as to bring this case within the jurisdictional provisions relied on, are fully disclosed in the petition for writ of certiorari under Subdivisions "A" and "B".

4. The following are the cases relied on to sustain the jurisdiction:

State Farm & Auto Insurance Co. v. *Coughran,* 303 U. S. 485, 82 L. ed. 970;

Griffin v. *McCoach,* 85 L. ed. 1481, 313 U. S. 498, 61 S. Ct. 1023, 134 A. L. R. 1462;

Klaxon & Co. v. *Stentor Electric Mfg. Co.,* 85 L. ed. 1477, 313, 487, 61 S. Ct. 1020.

Precise Question No. 1.

IN THE CASE OF SALES OF PERSONAL PROPERTY, SHOULD NOT THE LAW OF THE SELLER'S DOMICILE CONTROL AS TO THE VALIDITY OF ANY CONTRACT OF SALE, AND THE ESSENTIALS THEREOF?

First Reason Relied Upon for Writ.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN CONFLICT WITH A LOCAL STATUTE OF FLORIDA, AND IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF FLORIDA, IN A CASE ARISING UNDER FLORIDA LAW.

This is a fact case and adhering to the rule we will not here repeat the outline of facts set out in the petition under head of "Testimony".

We also refer the court to the facts set out in appellee's petition for re-hearing in Circuit Court of Appeals, Ground 1, R. page 249; for statement under "Testimony", Petition,

in regard to direct communications between plaintiffs and defendants, or between plaintiffs and Dickinson, or between Schelker and defendants. See R. pp. 45, 49, 175, 176.

As shown by the petition, pages 1 and 2, petitioners resided in Florida, and the subject matter of the alleged contract was personal property.

Personal property is transferable according to the law of the owner's domicile.

Walters & Walker v. *Whitlock,* 9 Fla. 86,

and personal property follows the domicile of the owner.

Wood v. *Ford,* 3 So. (2d) 490, 148 Fla. 66.

A contract contrary to the laws of Florida will not be enforced in that State.

Crowell v. *Skipper,* 6 Fla. 580;

Lloyd v. *Cooper Corp.,* 134 So. 562, 101 Fla. 533;

Kellog-Citizens National Bank v. *Felton,* 199 So. 50, 145 Fla. 68.

These principles were recognized and applied by this Court in:

Griffin v. *McCoach,* 85 L. ed. 1481, 313 U. S. 498, 61 S. Ct. 1023, 134 A. L. R. 1462.

Klaxon & Co. v. *Stentor Electric Mfg. Co.,* 85 L. ed. 1477, 313, 487, 61 S. Ct. 1020.

Therefore, the Circuit Court of Appeals was required to apply all Florida law on the subject of making a contract, and the case being a fact case did not do so.

The suit was for breach of contract and the decisions of the Florida Court must control and by these decisions that in order to make a contract there must be a meeting of two minds in one and the same intention in order that there may

be a contract, and the minds of the parties must assent to the same thing in the same sense.

Ross v. *Savage,* 66 Fla. 107, 63 So. 148;

Strong & Towbridge Co. v. *H. Baars & Co.,* 60 Fla. 253, 54 So. 92;

Knight Norman & Co. v. *J. C. Turner Cypress Lumber Co.,* 55 Fla. 690, 45 So. 1016;

Etheridge v. *Barkeley,* 25 Fla. 814, 6 So. 861.

Further under this head the Circuit Court of Appeals totally disregarded the Statute of Frauds and the Florida Supreme Court Decisions construing and applying same. The pertinent statute then in force is:

Section 5780, Compiled General Laws of 1927,

Section 3873, Revised General Statutes of 1920, is as follows:

> "5780. (3873) Contracts to sell personalty.—No contract for the sale of any personal property, goods, wares or merchandise shall be good, unless the buyer shall accept the goods (or part of them) so sold and actually receive the same, or give something in earnest to bind the bargains or in part payment, or some note or memorandum in writing of the said bargain or contract or contract to be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized (Id., Section 11)."

Now Sec. 725.02 Florida Statutes 1941.

The statute is construed as a whole and not in parts.

Under this statute the agreement must all be in writing.

Eckman et al. v. *S. Brash & Son,* 20 Fla. 763, and cases cited therein;

Alton Beach Realty Co. v. *Henderson,* 110 So. 256, 92 Fla. 689.

Again the Circuit Court of Appeals refused to apply Fla. law, and ruled that Dickinson on the facts was as a

mater of law the agent of defendants (R. 245), the District Court not having passed on this (R. 226), and was authorized to tell Schelker to write letter of March 31st, 1937 (R. 8), whereas the Florida law is that it was a question of fact to be determined by the trier of the facts.

Bush Gro. Co. v. *Conoley,* 61 Fla. 131, 55 So. 867.

And the Court also failed to apply the rule laid down by the Supreme Court of Florida in

Bellaire Securities Corp. v. *Brown,* 168 So. 625, text 636, 124 Fla. 47,

holding that an agent cannot authorize a sub-agent to sign a contract within the Statute of Frauds. See also

Rhode v. *Gallat,* 70 So. 471, 70 Fla. 536.

Also the Circuit Court of Appeals ruled there was a ratification as against the Florida law and in spite of the fact there was no showing that defendants knew of Schelker's act in writing letter March 31st, 1937 (R. 8). See (R. 245; R. 223; R. 100).

Oxford Lake Line v. *First National Bank,* 40 Fla. 349; 24 So. 480.

Madison vs. *Newsome,* 39 Fla. 149; 22 So. 270, holding there can be no ratification without knowledge of all the material facts.

The holding of the Circuit Court of Appeals, R. p. 244-245, that Schelker's letter of March 31st, 1937 (R. p. 8), was a complete contract is in effect holding that petitioners, defendants below, would have been required to sign the warranty assignment sent down by Schelker, with his letter of April 1st (R. p. 99, R. p. 215) in the face of the fact found by the Court that Schelker told Zaidenberg, of Roth & Company, in the conversation before writing the letter that the form of the assignment would have to be agreeable

to petitioners, defendants below (R. p. 57; R. p. 220 finding 4), and this in the face of a Florida decision that an agent has no power or authority to bind his principal in a sale of personal property by warranty.

Crooms vs. *Swan,* 1 Fla. 246, sometimes cited as 1 Fla. 211,

specifically holds that an agent cannot warrant (of course the District Court made no finding of the agency of Dickinson or Schelker, R. p. 222, finding 9).

Precise Question Number 2.

IN A CASE TRIED BEFORE A UNITED STATES DISTRICT COURT WITHOUT A JURY, WHERE THE WHOLE CASE IS MERELY ONE INVOLVING DISPUTED FACTS, IS THE CIRCUIT COURT OF APPEALS AUTHORIZED UNDER THE APPLICABLE FEDERAL STATUTE AND COURT RULE TO SET ASIDE THE DISTRICT COURT'S FINDING OF FACTS, AND ITSELF PASS ON THE CREDIBILITY OF WITNESSES AND SET ASIDE THE FINDINGS OF THE LOWER COURT AMPLY SUPPORTED BY THE EVIDENCE?

The reason for allowance for writ under this:

2. The Circuit Court of Appeals has refused to accord to the decision of a District Court the law in section 773, title 28 U. S. C. A., and Rule 52 (a) Federal Rules of Civil Procedure, and has set aside the findings of facts of the District Court, and substituted its own findings of fact and passed on the credibility of witnesses.

3. The Circuit Court of Appeals has in effect decided a federal question contrary to the decisions of this court.

The case was tried before the court, no jury having been requested under Rule 38, Rules of Civil Procedure. Then it seems that Section 773, U. S. C. A., Title 28, and Federal Rules Civil Procedure, 52 A would apply. In either, the District Court is entitled as trier of the facts to the same

consideration as a jury. Looking at the Circuit Court of Appeals' opinion (R. pp. 244-245), it has itself become the trier of the facts, even say the matter of the no cash basis of defendants' actions was an afterthought, thus passing on the credibility of the witnesses. Moreover, it says: "It is undisputed Dickinson was their agent, and authorized to bind the defendants" thus again passing on a question of fact not even passed on by the District Court (R. p. 245; R. p. 226).

Therefore, the decision of the Circuit Court of Appeals is contrary to and in conflict with the decisions of this Court in a federal matter.

State Farm & Auto Ins. Co. vs. *Coughran,* 303 U. S. 485, 82 L. ed. 970.

where this court said:

> "Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial court supported its judgment. To review the evidence was beyond the competency of the court. 28 U. S. C. A. Section 773, 875; *Walnut* v. *Wade,* 103 U. S. 683, 688, 26 L. ed. 526, 528; *Stanley* v. *Albany County,* 121 U. S. 535, 547, 30 L. ed. 1000, 1002, 7 S. Ct. 1234; *Law* v. *United States,* 266 U. S. 494, 496, 69 L. ed. 401, 402, 45 S. Ct. 175."

The same applies to the ruling of the Circuit Court of Appeals that Dickinson's letter of April 3rd (R. p. 100) was a ratification of Schelker's acts, the record being totally silent as to any knowledge of same on the part of defendants. R. p. 245; R. p. 223, District Court's finding No. 11.

Federal Courts now apply the State law.

Erie Railroad Co. vs. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817; 114 A. L. R. 1487; 82 L. ed. 1188.

Griffin vs. *McCoach,* 85 L. ed. 1481; 313 U. S. 498; 61 S. Ct. 1923; 134 A. L. R. 1462.

Klaxon & Co. vs. *Stentor Electric Mfg. Co.*, 85 L. ed. 1477, 313, 487; 61 S. Ct. 1020.

Palmer vs. *Hoffman*, decided February 1st, 1943, Advanced Sheet No. 8, Law Ed. U. S. Supreme Court Rep. 427.

We respectfully submit that on the face of the petition, the record and the authorities cited in the brief, that the petition ought to be granted.

Respectfully submitted,

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(5085)

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Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In this "common-law" action in which, on the first count of the complaint, respondents seek recovery from petitioners of damages for their breach of a sales contract, the Circuit Court of Appeals for the Fifth Circuit has reversed a judgment in favor of petitioners entered in the District Court of the United States for the Southern District of Florida after a trial before the judge without a jury.

The reversal by the Court of Appeals was upon an opinion of Judge Hutcheson in which Judge McCord concurred. A dissenting opinion was read by Judge Holmes.

Petitioners assert that the reversal upset the factual findings of the District Court. This is erroneous. The record will disclose, as Judge Hutcheson stated at the outset of his opinion, that there is no dispute as to the material facts. Actually, the decision of the Court of Appeals was based on its disagreement with the trial judge in respect of matters of law applicable to the uncontroverted facts. The error into which petitioners' counsel has fallen is attributable to the

misnomer by the District Court of conclusions of law which it denominated as "findings of fact".

The material facts need not be here repeated. They are fully and fairly set out in Judge Hutcheson's opinion. Those facts establish, ultimately, that petitioners owned an allowed claim of $68,629.77 against the United Cigar Stores Company, which was in reorganization in a proceeding under section 77b of the Bankruptcy Act pending in the District Court of the United States for the Southern District of New York; that respondents offered, through one Schelker, a New York attorney who acted for petitioners in the reorganization proceeding, to pay petitioners 75% of the net claim in cash; that Schelker advised Dickinson, petitioners' attorney, of the offer and also that a plan of reorganization of the debtor had been proposed by which unsecured creditors would receive payment of $250 in cash, an amount in bonds, and a number of shares of preferred and common stock for each $1,000 of allowed claim; that Dickinson passed respondents' offer on to the petitioners who were satisfied to sell at that price; that Dickinson was instructed to and did advise Schelker to accept the offer and to consummate the transaction; that Schelker telephoned the acceptance and confirmed it in writing on the same day; that respondents also confirmed their purchase in writing on that day; that on the following day, Schelker forwarded to Dickinson, for execution by petitioners, forms of assignment received from respondents; that three days later Dickinson met with petitioners, discussed the forms of assignment, and because petitioners were dissatisfied therewith, Dickinson was instructed to and did prepare forms which his clients would execute and sent them on to Schelker who was to obtain respondents' approval; but on the following day, Dickinson advised Schelker, who, in turn notified respondents, that petitioners would not go through with the deal for the reason that they did not understand that a cash payment was contemplated by the suggested plan of reorganization.

All these elements of the agency of Dickinson and Schelker for petitioners, respondents' offer, its acceptance, and of the

breach of the contract, are indubitably proven or supported by documentary evidence in the record.

In defense of the cause against petitioners, they put in issue the authority of Schelker and Dickinson to bind them to the sales contract, and pleaded the Statutes of Frauds of Florida and New York, both of which are to the identical effect so far as the instant case is concerned, i.e., that a contract for the sale of goods cannot be enforced unless some note or memorandum in writing of the contract be made and signed by the parties to be charged by such contract, or their lawfully authorized agents.

Regarding the scope of any authority of Schelker, petitioners maintained that their alleged misunderstanding of the terms of the plan of reorganization prevented a meeting of the minds necessary to the inception of a contract between them and respondents even though Schelker was unaware that petitioners had not been informed of the precise terms of such plan.

The Court of Appeals decided, as *matter of law:*

1. That Schelker and Dickinson were the agents of petitioners to make a binding acceptance of respondents' offer to purchase the claim.

2. That Schelker made such an acceptance of the offer.

3. That Schelker's letter of March 31st, 1937 (Plaintiffs' Exhibit A, p. 94) was a full compliance with the Statute of Frauds and petitioners became contractually bound thereby.

4. That Dickinson's letter of April 3rd, 1937 (Plaintiffs' Exhibit M, p. 100) read together with Schelker's of April 1st, 1937, was a ratification of the latter's agency and also a full compliance with the Statute of Frauds so as to bind petitioners to the contract.

COMMENTS ON THE QUESTIONS CLAIMED BY PETITIONERS TO BE INVOLVED.

The first "precise question" suggested by the petition, viz., whether the law of Florida, petitioners' domicile, should not control as to the validity of a contract of sale of personal property, implies that the Court of Appeals refused to follow the law of that state.

There is not the slightest justification for such a question. Neither in the District Court nor in the Court of Appeals did any question of conflict of laws arise. *Both sides treated the case as one involving a Floridian transaction on which only the laws of Florida were applicable,* notwithstanding that the offer and acceptance were made in New York and respondents might, therefore, have maintained that the laws of New York were controlling.

Nothing whatever in the prevailing opinion indicates that the Court did not confine itself to the laws of Florida. Only in the dissenting opinion is there any mention of a possible conflict. This was purely gratuitous in view of the tacit concession of all counsel that the case was concerned only with a Florida contract. There is implicit in the statements of Judge Holmes (p. 247) *the fact that the majority decided the issues of law according to the laws of Florida.* How, then, can petitioners maintain that the Court did not confine itself to the laws of their domicile, Florida? Moreover, petitioners do not point out that the law of any other jurisdiction was applied or that the applicable law of any other jurisdiction is at variance with that which was applied.

What petitioners do claim, actually, is that the Court of Appeals erred in its application of Florida law. That being so, the posing of the question, suggestive of a conflict of laws, is but a *pretense.*

The second "precise question" is based upon the erroneous premise that the Court of Appeals usurped the functions of the Trial Court in making findings of fact. It is clear from even a cursory reading of Judge Hutcheson's opinion that he meticulously avoided any factual controversy and that he

treated only with the material facts which were *undisputed.* Hence, the Circuit Court did not assume to pass on the credibility of witnesses or the probability of their versions of the transactions with which the case is concerned. This is exemplified by the fact that the Court's decision of the most vital point in the case was made "*apart from the wholly unsatisfactory nature of that testimony* (petitioners') *and the circumstances which so mark it as an afterthought*" (p. 244) that they misunderstood the terms of the reorganization plan. Petitioners' counsel, in arguing that the Court of Appeals decided that it *was* "an afterthought", overlooks the fact that the statement as to the "unsatisfactory nature of that testimony" is preceded by the words "apart from the" which serve to negative the assumption that, in such respect, the Court based its determination on its finding of the "afterthought".

As to the agency of Dickinson for petitioners, they maintain that it presented a question of fact which could only be determined by the Trial Court. That is utterly erroneous because the existence of such agency was a question of law to be decided on undisputed facts from which only one inference could fairly be drawn. (Meecham, (2nd Ed.) §50.) The District Court made no finding as to Dickinson's agency. As matter of law, the Court of Appeals decided that his agency had been established and, therefore, the Court of Appeals did not overrule the District Judge on a finding of fact in that respect.

As said by Judge Hutcheson in his opinion, the position of the respondents in the Court below was "that the findings (such as they are) and judgment are without support"; "that the *undisputed evidence* establishes that Schelker was authorized by defendants (petitioners here) to make the deal and that so authorized he did make in writing a sufficient memorandum to satisfy the Statute of Frauds (p. 244) and further that Dickinson's letter of April 3rd was both a ratification of Schelker's agency and itself an acceptance of plaintiffs' (respondents) offer" (p. 244).

In no respect did the Court of Appeals disagree with the District Court on matters of fact. It did, definitely, differ with it on principles of law.

But even if the Circuit Court did set aside any findings of fact touching on the question of Schelker's agency for petitioners, it may well be assumed that the Court determined that such findings were contrary to the evidence. The power of the Circuit Court to set aside findings that are clearly erroneous cannot be doubted (Rules of Civil Procedure 52a).

Assuming that the instant application resolves itself into one in which petitioners really assert that the Court of Appeals has decided questions of local law in conflict with applicable local decisions, respondents will demonstrate that, *regardless of their unimportance from the standpoint of the exercise of the discretion of this Court*, the legal principles applied by the Court of Appeals were those which not only obtain in Florida but prevail throughout the country. Such questions may be said to be:

1. Where an agent (Dickinson) is told that the principals (petitioners) are unwilling to sell an article of personal property unless a situation bearing upon the value of the property exists, and the agent fails to advise another agent of principals (Schelker) of such unwillingness with the result that the latter agent, acting for the principals, contracts for a sale of the property, are the principals bound thereby?

2. May an agent (Dickinson) or a sub-agent (Schelker) who is empowered to contract for a sale of his principals' (petitioners) personal property, sign a memorandum of the sale contract to satisfy the Statute of Frauds?

3. If one (Schelker) assumes, without authority to act for owners (petitioners) in the sale of the latter's personal property and signs a memorandum of the sale contract which complies with the requirements of the Statute of Frauds, and the owners act thereafter in a manner to indicate that

they are bound by the contract, is there not a ratification of the assumed agency and does not the memorandum make the contract enforceable under the Statute of Frauds even though the owners were unaware that the memorandum was made?

POINT I.

BECAUSE SCHELKER HAD AUTHORITY TO BIND PETITIONERS TO A CONTRACT FOR THE SALE OF THEIR CHOSE IN ACTION, THEIR RESERVATION (THAT THEY WOULD NOT SELL IF THE PROPOSED PLAN OF REORGANIZATION PROVIDED FOR A CASH PAYMENT TO CREDITORS), OF WHICH SCHELKER HAD NO KNOWLEDGE, COULD NOT HAVE ANY EFFECT UPON HIS AUTHORITY TO MAKE A BINDING ACCEPTANCE OF RESPONDENTS' OFFER TO BUY, NOTWITHSTANDING THAT THE PLAN CALLED FOR A CASH PAYMENT TO CREDITORS.

As Judge Hutcheson aptly said, "the record leaves in no doubt that defendants (petitioners) were advised and knew that Dickinson was acting for them in receiving and transmitting a definite and firm offer, and that after canvassing the offer, they directed Dickinson to direct Schelker to accept the offer."

Notwithstanding this condition of the record, petitioners maintain, as they did in the courts below, that they told Dickinson, prior to Schelker's acceptance of respondents' offer, that they would not sell if the proposed plan of reorganization provided for a cash payment and, therefore, Schelker, who knew of the cash payment *but was not advised of petitioners' statement to Dickinson,* was without authority to give the acceptance.

Parenthetically, it may here be noted that Schelker testified that he informed Dickinson by telephone of the details of the plan including the cash payment, and that Dickinson (who acted as petitioners' trial counsel) was not a wit-

ness and, of course, did not deny that Schelker gave him the information. This, it is surmised, is one of the reasons why Judge Hutcheson characterized the claim of "misunderstanding" as being "unsatisfactory" and an "afterthought" (244).

Petitioners did not seek a rescission of the contract for mistake but, as already stated, contended that their misunderstanding prevented a meeting of the minds of the parties "to the same thing in the same sense."

Even if it be assumed (as the Circuit Court did) that petitioners did actually "misunderstand" and believed that the plan of reorganization was different than it was, such misconception was with regard to a collateral matter which, had petitioners themselves accepted the offer, would not have prevented a contract of sale. The rule, universally recognized, is that a mistake as to collateral facts, not affecting the substance of the transaction, will not avoid a contract (55 Corpus Juris 115). In 1878, Judge Earl, writing for the New York Court of Appeals in *Dambmann* v. *Schulting*, 75 N. Y. 55, 64, said:

> "There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded, he must be held to his contracts."

The trial judge "found"—*in reality he legally concluded*—that because of petitioners' unfamiliarity with the proposed plan, an acceptance of respondents' offer would not bring about a meeting of the minds of the contracting parties

even though they were in accord as to the property involved in the sale and the price. Clearly, this was erroneous for the fundamental reason that ignorance of an extrinsic fact does not prevent the formation of a contract. *Nothing in the Florida statutes or judicial precedents is to the contrary.*

Logically it follows that an agent's acceptance of an offer under such a misapprehension, or knowing what the principal did not, but being unaware of the unwillingness of the principal to sell under such circumstances, does not affect the contractual relationship.

But the Court of Appeals preferred, evidently, to base its decision, not upon the rule that a mistake as to collateral or extrinsic facts will not avoid the contract, but rather upon the proposition that where a principal has conferred general authority upon an agent, the former will not be heard to assert that he intended to confer only limited power or that he did not expect that the agent would commit him under certain circumstances.

There is still another principle of law by which the same result is attained. It is that knowledge of the agent, acquired in the course of his duties, is attributable to the principal. (*Union Bank* v. *Call*, 5 Fla. 409, 428. Restatement of the Law, Agency, §9; Meecham, (2nd Ed) §1802, *et seq.*) Thus, because Schelker knew that cash was provided to be paid under the terms of the reorganization plan, such knowledge would be chargeable to petitioners and, of course, they will not be permitted to say, even though they may not have had actual knowledge, that want of knowledge prevented the inception of the contract.

The conclusion is irresistible that Schelker's authority to accept respondents' offer to purchase petitioners' claim was unaffected by the latter's uncommunicated reservation that they were unwilling to sell if cash were to be paid to creditors under the plan. *Moreover, even if Schelker knew of the reservation but respondents did not, Schelker's acceptance, though it would violate petitioners' instructions to him, would have bound the petitioners to the sale contract*

(*American Lead Pencil Co.* v. *Wolfe*, 30 Fla. 360, Meecham, (2nd Ed.) §710, 2 Corpus Juris Secundum, 1203).

Petitioners argue that because they did not *intend* to sell their claim if a cash payment were to be made under the plan of reorganization, their minds could not have met with respondents on a contract of sale of the claim. They rely upon several Florida decisions, the earliest of which is *Etheredge* v. *Barkley*, 25 Fla. 814. That case quoted and relied on Judge Story (1st Story on Contracts, §490) where he said:

> "So long as any essential matters are left open for further consideration, the contract is not complete; and the minds of the parties must assent to the same thing in the same sense."

It is from this quotation, evidently, that petitioners' counsel has extracted the language that to make a valid contract, "the minds of the parties must assent to the same thing in the same sense."

The principle announced by Judge Story and followed in the cited cases affords no comfort to petititoners for the reason that the *"assent"* referred to relates only to that which is *manifested*, as distinguished from that which is merely *mental.*

Professor Williston, in the Revised Edition of his work on Contracts says that "the test of the true interpretation of an offer and acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant" (Vol. 1, p. 294). He then quotes with praise an excerpt from the opinion of Judge Learned Hand in *Hotchkiss* v. *National City Bank*, 200 Fed. 287, 293 (aff'd 231 U. S. 50, 34 S. Ct. 20), as follows:

> "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words,

> which ordinarily accompany and represent a known intent. If however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their *unexpressed intent.*" (Our emphasis.)

Thus, assuming that petitioners intended not to sell their claim if cash were to be paid thereon under the reorganization plan, but they (or their authorized agents) failed to manifest such intention when respondents' offer was accepted, the formation of a binding contract was not prevented thereby. Respondents were not advised of petitioners' intention and even if such intention were "proved by twenty bishops", the contract of sale would be unaffected.

Petitioners, acting through Dickinson and Schelker, received respondents' offer to purchase their claim for a definite sum of money; that offer was accepted. A valid contract arose, notwithstanding that, unknown to respondents, the petitioners may not have been satisfied to sell if the proposed plan of reorganization provided for a cash payment to creditors.

POINT II.

HAVING AUTHORITY TO ACCEPT RESPONDENTS' OFFER TO PURCHASE PETITIONERS' CHOSE IN ACTION, EITHER DICKINSON OR SCHELKER, WHETHER AGENT OR SUB-AGENT, WAS EMPOWERED, BY IMPLICATION, TO SIGN A MEMORANDUM OF THE CONTRACT OF SALE TO SATISFY THE STATUTE OF FRAUDS.

It is the law, prevailing throughout the United States, that

> "* * * the creation of an agency carries with it the usual and necessary means appropriate to the ac-

> complishment of its object, and clothes the agent with such authority as is proper and necessary to effectuate its purposes. It includes the capacity to do all those things in the principal's behalf which are necessary and proper in carrying on the business in its usual manner and which the principal could and would usually do in similar circumstances were he acting personally instead of through another." (2 Corpus Juris Secundum 1229.)

And when a sub-agent is employed by an agent with the principal's consent or authority, the same rule is applicable to the sub-agent (*Greeley-Burnham Co.* v. *Capen,* 23 Mo. App. 301).

Because a principal would, ordinarily, sign a memorandum of a sale of personal property to comply with the requirements of the Statute of Frauds, it follows, necessarily, that an agent or sub-agent would, by legal implication, have such authority, and the authority to make the memorandum is not required to be in writing (*Smith* v. *Shackleford,* 92 Fla. 731, 110 So. 358; *Bellaire Securities Corp.* v. *Brown,* 124 Fla. 47, 75, 168 So. 625, 636; *Dykers* v. *Townsend,* 24 N. Y. 57, 59).

Both Schelker and Dickinson signed memoranda of the contract. Schelker's is contained in his letter to respondents (Plaintiffs' Exhibit A). Dickinson's is to be found in his letter to Schelker (Plaintiffs' Exhibit M) read with Schelker's letter to Dickinson (Plaintiffs' Exhibit L) and the form of assignment (Plaintiffs' Exhibit D).

It is well settled that the "memorandum" need not be contained in one writing. If the writings are so connected that all are authenticated by the signature to one, the statute is satisfied as to the signer (*Crawford* v. *Obrecht,* 189 Atl. Rep. 809, 812; BROWNE, STATUTE OF FRAUDS, (5th Ed.) §§346b-349).

There is nothing contrary in the Florida law.

POINT III.

WHERE RATIFICATION OF THE AUTHORITY OF AN AGENT TO ACCEPT AN OFFER FOR THE SALE OF PERSONAL PROPERTY TAKES PLACE, SUCH RATIFICATION VALIDATES, EVEN WITHOUT KNOWLEDGE, A MEMORANDUM OF THE SALE TO SATISFY THE STATUTE OF FRAUDS MADE BY THE AGENT BEFORE RATIFICATION.

The Statute of Frauds is concerned only with the *enforcement* of oral contracts (BROWNE; STATUTE OF FRAUDS, 5th Ed. § 354a). So far as the statute is concerned, the question involved in a case of a sale by an agent or sub-agent is *not* whether he had authority to make the requisite memorandum but whether he was authorized to make the contract of sale.

It follows that if, through ratification of the act of the person purporting to act for the principal in the making of an oral contract of sale of goods, an agency has been established, the authority of that person is the equivalent of that antecedently conferred, and since an authorized agent is, by legal implication, authorized to sign a memorandum to satisfy the Statute, no good reason exists for not according full efficacy to the memorandum signed before the ratification of the agency has taken place.

Upon the same logic, the contention of petitioners as to ratification of Schelker's agency can readily be disposed of. It is said that petitioners could not be held to have ratified Schelker's act in making the contract because they did not know that he had written the letter confirming the deal (Plaintiffs' Exhibit A). Such letter was not the contract. That reposed in parol. The letter was merely a memorandum thereof which, among other things, made the oral contract enforceable. Petitioners were not held to have ratified a contract in writing but rather an oral contract by which they agreed to sell their claim for 75 cents on the dollar to respondents. Dickinson's letter (Plaintiffs' Exhibit M)

written pursuant to express authority of petitioners, after they had been advised of the contract made by Schelker in their behalf, was a complete ratification of the oral contract. *The fact that Schelker had confirmed the trade was not a material fact of the contract and, hence, knowledge thereof by petitioners was not essential to the validity of the act of ratification* (MECHAM, 2d Ed. §§ 430-432, 438). *Madison* v. *Newsome*, 39 Fla. 149, is not at variance with the rule that knowledge of only *material* facts is necessary to ratification.

POINT IV.

THE QUESTIONS, IF SUCH THEY BE, WHICH PETITIONERS SEEK TO HAVE REVIEWED, ARE NOT OF GRAVITY OR IMPORTANCE AND, THEREFORE, THIS COURT SHOULD NOT GRANT THE WRIT APPLIED FOR.

This Court has said (*Re Woods*, 143 U. S. 202, 36 L. Ed. 125, 12 Sup. Ct. Rep. 417) that "the circuit courts of appeals were created for the purpose of relieving this court of the oppressive burden of general litigation * * *."

The instant case is but a piece of general litigation in which only the parties have any interest. No question of a Federal character is involved, and, of course, the case does not present any question where the Circuit Courts have differences of opinion. The final judgment in the action will determine, merely, whether petitioners have breached a contract and if so, what amount of money damages respondents have sustained.

If such a case falls into the category of those in which this Court should grant certiorari, every case decided in all the Circuit Courts would be entitled to the right of review. The result will be that the relief afforded this Court by the act of March 3, 1891, chap. 517 (26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488), by which the Circuit Courts were created, will have failed and a situation of great peril, because of the size of the docket, will again exist.

CONCLUSION.

THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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